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IN THE

Supreme Court of the United States

October Term, A. D. 1949

LOUIS SOBLE, *Petitioner*,

versus

THE STATE OF TEXAS, *Respondent*.

On Certiorari from the Court of Criminal Appeals of Texas

BRIEF FOR THE PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

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Brief for the Petitioner

First:

Citation of the Opinion of the Court of Criminal Appeals of Texas.

The opinion of the Court of Criminal Appeals of the State of Texas in this case is reported in Volume 218 Southwestern Reporter (2nd), page 195. The opinion on Petitioner's motion for a rehearing is reported in Volume 218 Southwestern Reporter (2nd) page 197. These opinions are copied in the Transcript of the Record in this cause on pages 190 and 221 respectively.

Second:

Jurisdictional Question

The jurisdiction of this Court in this matter is invoked under Section 344 of Title 28 of the Federal Code Annotated on the proposition that the Fourth and Fourteenth Amendments to the Constitution of the United States were violated in that in the State Courts he was deprived of his liberty without due process of law and was denied the equal protection of the law in that his premises were unlawfully searched without a valid search warrant and the result of said search and seizure was admitted in evidence against him over the objections of this petitioner.

Authorities

Title 28, Section 344 of the Federal Code Annotated;

McDonald vs. The United States, 93 Lawyers Ed. 323;

Gauled vs. United States, 255 U. S. Reports, 298;

Morris Malinski vs. New York, 344 U. S. Reports, 401;

Johnson vs. United States, 333 U. S. Reports, 1092;

Jack Truprano, et al vs. United States, 334 U. S. Reports, 699.

Second.

Statement of the Case

The petitioner was indicted and tried in the State Court for the offense of burglary of a house alleged to be the

property of one Glenn L. Smith, and was convicted of said offense and his punishment assessed at a term of ten years confinement in the State penitentiary.

The witness Glenn L. Smith testified that there was certain property belonging to him in the house at the time of the burglary, which was taken away. That subsequently he found some of that property located in petitioner's garage at petitioner's home on Cedar Springs Street, in Dallas, Texas. That a deputy sheriff was with him and the deputy had a search warrant. (Transcript of the Record, pages 39 to 52). The petitioner objected to this testimony as to the result of said search and seizure because no search warrant was produced, (Bill of Exceptions No. 1, Transcript, of the Record page 23. One W. E. Richburg, a justice of the peace, testified that he issued a search warrant on December 13th, 1946, but was unable to locate it. The Search warrant was never produced. (Transcript of the Record pages 77 and 78.) The affidavit upon which said purported search warrant was predicated, was produced and introduced in evidence, (Transcript of the Record pages 32 and 33, Bill of Exceptions No. 5). Said affidavit for the search warrant does not contain the name of the accused, nor give any description of him, nor state that his name was unknown. Neither does it include the premises that was searched in the list of places for which the search warrant was sought. The petitioner took the witness stand and admitted the possession of the property taken by reason of the

search and seizure, but emphatically denies that said property was ever in the alleged burglarized premises, or that it belonged to the witness Glenn L. Smith.

Petitioner appealed from the judgment of conviction to the Court of Criminal Appeals of Texas, where the judgment of the trial court was affirmed. (Transcript of the Record page 192). Thereupon the petitioner filed in the Court of Criminal Appeals his motion for a rehearing. (Transcript of the Record pages 193 and 201. Of which motion was overruled by said Court of Criminal Appeals (Transcript of the Record page 221). In petitioner's Supplemental Brief on his Motion for a rehearing he definitely raised the Federal question, as follows:—"Fourth Proposition. The interpretation put upon the Texas Statute by this Court is in violation of Article One, Section 9 of the Texas Constitution and of the 4th Amendment to the Constitution of the United States, which is specially adopted by said Statute, and, as so construed, deprives this defendant of his liberty and property without due process of law and denies to him the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States." (Transcript of the Record pages 219 and 220).

Third.

Errors Relied Upon

First Assignment

The trial court erred in admitting in evidence all that testimony of the witness Glenn L. Smith with reference to the search of the petitioner's premises and garage at his home, together with the result of said search, because no valid search warrant was produced therefor. In doing so this petitioner was deprived of his liberty without due process of law.

Second Assignment

The trial ourt erred, after it was affirmatively shown that the purported search warrant, if any, was based upon a defective and insufficient affidavit therefor, in overruling this petitioner's motion to withdraw from the consideration of the jruy all that testimony with reference to the search of petitioner's garage and the result of said search. In doing so this petitioner was deprived of his liberty without due process of law.

Third Assignment

The Court of Criminal Appeals of Texas erred in holding that this petitioner, having taken the witness stand and admitted the possession of the property found by reason of the search rendered his objection to said search untenable.

First Proposition Under the First and Second Assignments of Error

The search of petitioner's premises without a valid seach warrant is illegal and the testimony with reference to such search is inadmissible in evidence, and a conviction based upon such testimony is depriving the defendant of his liberty without due process of law, and denies him the equal protection of the law.

Authorities

Constitution of the United States, Fourth Amendment.

Constitution of the United States, Fourteenth Amendment.

Constitution of Texas, Article 1, Section 9.

Article 727-a Code of Criminal Procedure of Texas.

Article 310 Code of Criminal Procedure of Texas.

Article 317 Code of Criminal Procedure of Texas.

Article 318 Code of Criminal Procedure of Texas.

Remarks

The affidavit for this search warrant does not give the name of the accused, nor that his name was unknown, and nowhere gives a description of him. Neither does it describe the place to be searched. (Transcript of the Record page 33.)

The Fourth Amendment to the constitution of the United States is as follows:

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and *particularly describing the place to be searched and the persons or things to be seized.*"

The Fourteenth Amendment to the constitution of the United States provides:

"No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1, Section 9 of the constitution of Texas is as follows:

"The people shall be secure in their persons, houses, papers, and possessions from all unreasonable seizures or searches, and no warrant to search any place or to seize any person or thing shall issue without describing them as near as may be, nor without probable cause by oath or affirmation".

Article 310 of the Code of Criminal Procedure of Texas is as follows:

"A warrant to search for and seize any property alleged to have been stolen and concealed in a particular place may be issued by a magistrate whenever written sworn complaint is made to such magistrate setting forth,

(1). The name of the person accused of having stolen or concealed the property, or if his name be unknown, giving a description of the accused, or stating that the person who stole or concealed the property is unknown.

(2). The kind and value of the property alleged to be stolen or concealed.

(3). The place where it is alleged to be concealed.

(4). The time, as near as may be when the property is alleged to have been stolen."

Article 317 of the Code of Criminal Procedure of Texas, is as follows:

"Any peace officer to whom a search warrant is delivered, shall execute it without delay and forthwith return it to the proper magistrate. It must be executed within three days from the time of its issuance, and shall be executed within a shorter period if directed in the warrant by the magistrate."

Article 318 of the Code of Criminal Procedure of Texas is as follows:

"The time allowed for the execution of a search warrant shall be three whole days exclusive of the day of its issuance and the day of its execution."

Second Proposition Under First and Second Assignments of Error

A search warrant issued upon a void or defective affidavit therefor is void and the result of a search under it is not admissible in evidence.

Authorities

Manley vs. State, 48 S. W. (2nd) 256;

Williams vs. State, 47 S. W. (2nd) 298;

Tillery vs. State, 26 S. W. (2nd) 844;

Anderson vs. State, 25 S. W. (2nd) 839;

Denzlinger vs. State, 28 S. W. (2nd) 160;

Miller vs. State, 114 S. W. (2nd) 244;

Loven vs. State, 167 S. W. (2nd) 515;

Burke vs. State, 120 S. W. (2nd) 95.

In the Manley case cited above the search warrant gave the name of the accused, or possessor, as "a negro, name unknown". There was no description of the accused. The Court of Criminal Appeals of Texas held that the affidavit was imperfect and insufficient, and further held "The search warrant based upon the imperfect affidavit was illegal, and the evidence obtained through the search of the appellant's residence upon the authority of the search warrant mentioned was inadmissible in evidence".

To the same effect are the other cases cited above.

Third Proposition Under First and Second Assignments of Error

The evidence as to the result of the search of petitioner's premises, being in violation of the Constitution of the United States, fourth amendment, and of the Constitution of the State of Texas and the statutes of the State of Texas cited above, was not admissible in evidence, and its admission was error and deprived this petitioner of his liberty without due process of law as guaranteed him by the Fourteenth Amendment to the Constitution of the United States.

Authorities

Code of Criminal Procedure of Texas, Article 727-a.

This article of the code of Criminal Procedure is as follows:

"No evidence obtained by an officer or other person in violation of the provisions of the Constitution or laws of the State of Texas, or of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case."

Proposition Under Third Assignment of Error

After illegal testimony has been introduced against the defendant, over his objections, the fact that he subsequently takes the witness stand and gives testimony to meet

such testimony the fact he does introduce testimony to meet it does not cure the error.

Authorities

Moore vs. State, 146 S. W. Rep. 185;

Brown vs. State, 150 S. W. Rep. 431;

Dawson vs. State, 40 S. W. Rep. 731;

Attaway vs. State, 55 S. W. Rep. 45;

Red vs. State, 46 S. W. Rep. 408.

The Court of Criminal Appeals, in passing on said question, said:—"For the purpose of this discussion it will be assumed that the search warrant was invalid, and the search thereunder was unauthorized, but such, however, by no means shows reversible error for appellant, testifying as a witness, admitted possession of the property found in his garage.

"The only fact established by the search of appellant's garage was that he possessed the property found therin. The fact of possession having been admitted by him, rendered his objection to the search untenable."

Your petitioner submits that naked possession was not the only fact established by the search of appellant's garage. The further fact of the presumption of guilt created by the recent possession of property stolen from the burglarized premises at the time of the burglary, was involved in the possession of said property by petitioner. In order

to rebut that presumption of guilt by reason of said possession, and not the possession itself, the petitioner took the stand as a witness and admitted the possession of the property, but said it was not taken from the alleged burglarized premises; that it was never in said burglarized premises and never belonged to the witness Glenn L. Smith; that he purchased same after the house is alleged to have been burglarized, (Transcript of the Record page 152).

In the Moore case cited above, where the question arose as to whether or not the error in the admission of evidence was cured by reason of the fact that after its introduction over the appellant's objections introduced testimony concerning the subject matter of the objectionable testimony, the Court of Criminal Appeals of Texas held "No rule seems to be better established than the one that where testimony has been erroneously admitted, and the defendant is called upon to meet such testimony, the fact that he does introduce evidence to meet it does not cure the error. This ought to be considered as elementary."

In the Brown case cited above the Court of Criminal Appeals of Texas held "However erroneously testimony may be admitted against the accused, it does not cure the error for him to meet this testimony with the best evidence attainable; nor does he waive the error on the part of the court in admitting such testimony originally. This is elementary."

The other cases cited above are to the same effect.

Your petitioner further submits that at the time of the execution of the purported search warrant the time for its execution as fixed by statute had expired, and same had become functus officio, and its execution was unlawful and the result of the search thereunder was not admissible in evidence.

Authorities

Holman vs. State, 14 S. W. (2nd) 849;

Swanson vs. State, 18 S. W. (2nd) 1082;

Glenniwinkle vs. State, 21 S. W. (2nd) 514.

In the Holman case cited above the appellate court says: "The search warrant used by the officers had been issued more than three days when the search was made, and, under articles 317 and 318 Code of Criminal Procedure 1925 had become functus officio" and further held that by reason thereof the search was illegal. To the same effect are the holdings in the Swanson case and the Glenniwinkle case cited above.

Remarks

It is evident that the search warrant in this case was invalid by reason of the fact that no sufficient affidavit was had, and that the result of the search of petitioner's premises by reason thereof was not admissible in evidence against this petitioner. Said search was in violation of the

constitution of the United States and of the laws and constitution of the State of Texas. It is further apparent that the petitioner did not waive the error in its admission by taking the stand as a witness and admitting the possession of the articles of merchandise taken from said searched premises by reason of said search. This testimony so erroneously admitted was material and damaging against this petitioner. In the admission of said testimony over the objections of this petitioner deprived him of his liberty without due process of law and denied him the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States of America.

Wherefore this petitioner most earnestly prays that this Honorable Court grant his writ of certiorari in this cause, and upon a consideration of same, and the record in this cause, that the judgment of the trial court and of the Court of Criminal Appeals of Texas in this cause be reversed and this cause remanded to the trial court for another trial in

the terms of the law; for all of which he will ever, as he is in duty bound, pray.

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I hereby certify that I have this, the 31st day of August A. D. 1949, by due course of mail, served a copy of the foregoing brief on the Attorney General of Texas, the attorneys for the respondent hererin.

Attorney for the Petitioner.